BEFORE THE

Federal Communications Commission

WASHINGTON, D.C.

In the Matter of	)	
	)	
AMERITECH CORP.,	)	
Transferor,	)	
	)	
and	)	
	)	
SBC Communications, Inc.,	)	CC Docket No. 98-141
Transferee	)	
	)	
for Consent to Transfer Control	)	

COMMENTS OF TIME WARNER TELECOM ON PROPOSED CONDITIONS

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d/b/a TIME WARNER TELECOM

July 19, 1999

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COMMENTS OF TIME WARNER TELECOM ON PROPOSED CONDITIONS

Time Warner Telecom Holdings Inc. d/b/a Time Warner Telecom ("TWTC"), by its attorneys, hereby files its comments in opposition to the conditions proposed by SBC Communications Inc. and Ameritech Corporation (collectively, "SBC/Ameritech") in the above-captioned docket.

I. INTRODUCTION AND SUMMARY

The conditions proposed by SBC/Ameritech contain so many loopholes, qualifications and ambiguities that they are largely meaningless for the purpose of lowering entry barriers in the SBC and Ameritech regions. For example,

- The proposed performance measures are so aggregated as to prevent effective performance monitoring.
- The collocation provisions merely commit SBC/Ameritech to abide by existing law and cannot even ensure this result given the weakness of the proposed audit procedures.
- The purported commitments to upgrade OSS on a uniform basis throughout SBC's and Ameritech's regions offer endless opportunities for delay. SBC/Ameritech would

exploit those opportunities just as Bell Atlantic/NYNEX has exploited weaknesses in its OSS-related conditions.

- The structural separation for advanced services is likely only to harm, not promote, competition in advanced services.

- The most favored nation commitments are so limited and qualified as to be of little use to CLECs.

- The services and functionalities that the proposed regional interconnection agreements would cover are described in vague terms that SBC/Ameritech would likely construe to severely limit the scope of such agreements.

- Finally, the out-of-region service provisions commit the parties to limited entry in the large business market where numerous CLECs of much smaller scale are already entering; the commitments include effectively no obligation to enter the residential market in which CLECs lack the scale and scope to compete.

It strains credulity to assert that these proposed conditions in any way reduce the opportunities for SBC and Ameritech to act on the increased incentives for anticompetitive behavior that the merger would create.

Of course, the fact that the parties seeking approval for the transfer of Ameritech's licenses would propose conditions that are largely meaningless is unsurprising. But the Commission must not respond to the SBC/Ameritech filing by tinkering and tweaking. It must redraft, beginning with the proposition that the merger will not be approved until SBC and Ameritech have satisfied the FCC's conditions. This will give the parties the crucial incentive to cooperate in opening their markets. That the merger must be put on hold pending compliance is only SBC's and Ameritech's fault for failing to cooperate in the past to lower entry barriers. Moreover, any possible delay would put SBC

and Ameritech in essentially the same position as Bell Atlantic and GTE, which have put their proposed transaction on hold pending Bell Atlantic's Section 271 applications.

It seems unlikely that any conditions would be effective if established as conditions subsequent. If the Commission insists on pursuing this approach, however, it must eliminate the loopholes in the conditions proposed by SBC and Ameritech, and it must make financial penalties for failure to meet the conditions automatic (except in extremely rare exceptions) and severe.

II. DISCUSSION

A. Performance Measurements.

The performance measurements proposed by SBC/Ameritech are purportedly "based upon those developed in the Texas collaborative process" (Appendix A at ¶ 1), but in fact include only 20 measurements where the Texas measurements include 122. Given the limited commenting period, TWTC cannot provide a detailed comparison of the Texas performance measurements with those suggested herein. The mere reduction from 122 to 20 however clearly indicates that the proposed measurements are too aggregated to be useful. It is also worth noting certain other obvious problems with even the limited number of measurements proposed by SBC/Ameritech in this proceeding. For example, those measures appear not to be geographically disaggregated; there appears to be no proposal for SBC/Ameritech to report on the performance measure categories provided to its affiliates; and

there are significant delays for implementation (as much as one year after closing the merger).

The performance measurements proposed by SBC/Ameritech are therefore inadequate. TWTC has participated in the Texas Section 271 collaborative process and has concluded that the list of performance measures adopted therein is sufficient to establish the preconditions for competition. Thus, rather than accept the gutted version of the Texas measurements proposed by SBC/Ameritech, the FCC should simply adopt the actual Texas measurements on an SBC/Ameritech regionwide basis as a condition for approval of the instant transaction.

B. Collocation

In the area of collocation, SBC/Ameritech has made the grand concession to abide by the law. See id. at ¶¶ 3-4. SBC/Ameritech further proposes that it be subject to an audit procedure that will likely be so limited in scope as to prevent meaningful oversight of its compliance with the collocation rules.

SBC/Ameritech states that it will choose an auditor that, within 10 months of Merger Closing Date, will prepare a report evaluating SBC/Ameritech's collocation offerings. See id. at ¶ 6. The scope of the audit and proposed testing will initially be submitted to the FCC staff. But the FCC has no power to change these parameters, the requirements themselves are to be kept confidential, and CLECs apparently have no opportunity to comment on the scope of the audit. Indeed, at no time during the

audit does the FCC have the authority to change the course adopted by the auditor.

Ten months after the Merger Closing Date, the auditor will submit its report with the FCC. The report will include "a description of any limitations imposed on the auditor in the course of its review by SBC/Ameritech or other circumstances that might affect the auditor's opinion." See id. at ¶ 6.f. But even if the auditor explains in its report that SBC/Ameritech imposed limitations on its review that effectively prevented a meaningful assessment of SBC/Ameritech's collocation offerings, the conditions include no penalties for imposing such limitations. Nor is there any basis for CLECs to review whatever conclusions are reached in the audit, since the FCC staff alone can review the underlying documents. It is hard to see what possible utility such an audit would have.

If the Commission decides that an audit should be conducted, it should establish it in its collocation or performance measurement dockets, and require that all ILECs subject to collocation requirements comply. The scope of such audits should be defined by the Commission, the auditor should be chosen by the Commission, and CLECs should be given an opportunity to comment on both the proposed scope of the audit and the results of any such audit. Finally, the Commission should establish financial penalties applicable to ILECs that, as determined by the auditors, have not met the FCC's collocation requirements.

C. Operations Support Systems

The proposals for enhancements to OSS are little more than sham promises. Three fundamental problems are obvious. First, the needs of facilities-based CLECs such as TWTC are largely neglected in SBC/Ameritech commitments to develop and deploy uniform interfaces, to provide direct access to order processing systems, and to make enhancements to EBI. None of these commitments covers interconnection facilities, such as interconnection trunks, or number portability. See id. at ¶ 9, 10. These are some of the few services that facilities-based carriers must use OSS to purchase from ILECs. They must therefore be included in any list of functionalities covered by regionwide OSS enhancements.

Second, the procedures proposed by SBC/Ameritech for implementing the OSS commitments do virtually nothing to prevent SBC/Ameritech from delaying implementation indefinitely. For example, SBC/Ameritech states that deploying uniform interfaces will take 24 months (30 in Connecticut), assuming that phase 2 of the process takes only one month. See id. at ¶ 10. But phase 2 will never last only one month. During that phase, SBC/Ameritech and CLECs are to agree on SBC/Ameritech's plan for developing and deploying uniform interfaces. Of course, SBC/Ameritech has a powerful incentive degrade CLECs' access to its OSS. Thus, CLECs will almost certainly find many problems with SBC/Ameritech's plan. The plan will therefore likely be submitted to the Common Carrier Bureau Chief who is to consider whether to refer the

issues to an arbitrator. The Bureau review will likely take months, given the complexity of interface issues. If referred to arbitration (as is likely), the process will extend much longer as (1) a third party arbitrator and a subject matter expert are chosen, (2) the third party arbitrator becomes familiar with OSS, and (3) SBC/Ameritech uses every opportunity available to delay the process. As a result, phase 2 will likely last longer than one year.

Just as the assumption that phase 2 of the uniform interface development and deployment process will last one month is baseless, so are many other similar assumptions about the duration of the OSS work proposed in the conditions. For example, phase 3 of the interface development and deployment process is procedurally similar to phase 2 and contains similar opportunities for delay. See id. at ¶ 11.c. The same is true of the process for establishing either a software solution for business rules or uniform business rules (a process that does not even begin until phase 2 of the uniform interface process is completed) (¶ 14) as well as the procedures for regionwide OSS upgrades (¶ 16.c), which are again procedurally similar to the interface development and deployment process. Even where the proposals for OSS upgrades include specific timeframes without obvious procedural opportunities for delay (e.g., EBI enhancements (¶ 13) and uniform change management (¶ 15)), there are no penalties for failing to meet the target completion dates.

Furthermore, the procedures for dispute resolution are unreasonable. Under its proposal, (1) SBC/Ameritech, not CLECs, submits disputed issues to the Common Carrier Bureau Chief for resolution and (2) only SBC/Ameritech selects the list of possible subject matter experts that a third party arbitrator may use. See id. at ¶¶ 11.b, 11.c, 14.a, 14.b, 15, 16.c(2), & 16.c(3). These proposals only make it more likely that decisions reached by the Common Carrier Bureau and especially third-party arbitrators will benefit SBC/Ameritech and will harm competition.

In sum, SBC/Ameritech's OSS-related proposals are flawed, and they should be scrapped. In their place, the Commission should adopt OSS upgrade requirements that take into account the needs of facilities-based carriers (as described) and that are preconditions for FCC approval of the transfer of the Ameritech licenses. Making compliance with the OSS changes preconditions for FCC approval would give SBC/Ameritech the critical incentive to cooperate with CLECs. Furthermore, as in the more successful state Section 271 proceedings, all OSS upgrades should be subject to third party testing. Finally the Commission itself should make all final substantive decisions as to the adequacy of the OSS changes.

D. Structural Separation for Advanced Services

SBC/Ameritech promises to provide advanced services through separate affiliates that are subject to essentially the same requirements as Section 272 affiliates. But as TWTC and others demonstrated in comments filed in the Commission's advanced

service proceeding,[1] competition is likely to be harmed where an ILEC can provide advanced services through an unregulated affiliate.[2] This is so even where the Section 272 requirements apply to such a separate affiliate.

First, a separate affiliate structure is unlikely to diminish opportunities for the ILEC to discriminate against unaffiliated advanced services providers. Nondiscrimination requirements applicable to Section 272 affiliates only require that the ILEC provide to unaffiliated advanced services providers the same arrangements it offers to its affiliated provider.[3] But if the unaffiliated provider does not need precisely the same arrangements as the ILEC's affiliate, the nondiscrimination protection is of little assistance. Given the dynamism and diversity of advanced services technology, it is likely that unaffiliated providers will need different arrangements than the ILEC's affiliate. The antidiscrimination protection of the separate affiliate structure is therefore likely to be unhelpful.

Indeed, over time, the ILEC can design its own interconnection arrangements with its advanced services affiliate

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1 See Deployment of Wireline Services Offering Advanced Telecommunications Capability, *Notice of Proposed Rulemaking*, CC Docket No. 98-147 (rel. Aug. 7, 1998).

2 See Comments of Time Warner Telecom and Declaration of Leland L. Johnson, CC Docket No. 98-147 (Sept. 25, 1998).

3 See Implementation of the Non-Accounting Safeguards of Section 271 and 272 of the Communications Act of 1934, as amended, 11 FCC Rcd 21905, at ¶¶ 202-212 (1996).

to make them unuseful as models for unaffiliated advanced services providers. Because the ILEC will provide wholesale inputs for its affiliate and its affiliate's competitors, the ILEC will have enough information to ensure that its affiliate uses interconnection arrangements that, while fully adequate for the affiliate, do not meet the needs of competitive advanced service providers. Given that there is apparently no restriction on employees changing employers from the ILEC to the affiliate and back again under the instant proposed conditions, the flow of information needed to implement this form of subtle but powerful discrimination is all the more likely.

Even where the unaffiliated advanced services provider requests precisely the same arrangement obtained by the affiliated provider, the non-affiliate may be unsuccessful in obtaining the arrangement. For example, where collocation space is extremely limited, the ILEC affiliate could well obtain space that is denied to unaffiliated providers that subsequently seek collocation. Furthermore, the ILEC could try to refuse to provide CLECs arrangements it previously provided to its affiliate by claiming that the CLEC's equipment is incompatible with the ILEC network or that the ILEC's network has changed since granting the affiliate the arrangement in question. As these examples demonstrate, there are endless opportunities for the ILEC to attempt to justify its refusal to deal.[4]

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[4] It is also important to point out that the Section 272 safeguards are intended to be adequate safeguards in the

Given the substantial opportunities for ILEC discrimination, the proposal to deregulate the SBC/Ameritech advanced services affiliate will likely leave competitors worse off than if SBC/Ameritech were required to provide advanced services on an integrated basis and subject to Section 251(c) obligations. For example, discriminatory behavior could eliminate competitive advanced service providers entirely from certain parts of the market. This would be true where the SBC/Ameritech affiliate, but no other advanced services providers, can collocate in a central office. Where this is the case, the only way to compete would be via resale. But the deregulation of the SBC/Ameritech advanced services affiliate would eliminate that as an option.

Furthermore, the SBC/Ameritech advanced services affiliate may control a part of the network that its competitors need in order to compete. The ILEC would obviously have the incentive to transfer such facilities to its affiliate. But if the affiliate were not regulated, competitors would not be able to lease essential facilities as UNEs. Indeed, determining which facilities should be classified as UNEs in which markets would

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interLATA context only after a BOC has met the requirements of Section 271, including the OSS provisions of the checklist. Meeting these conditions would reduce the opportunities for discrimination against unaffiliated competitors (whether providing voice or data). If anything, the logic of the Section 271-272 provisions would indicate that Section 272 separation requirements that SBC/Ameritech proposes to rely on will not be adequate to protect competition until SBC/Ameritech has complied with Section 271 in a particular state.

prove to be extremely costly and inexact. The price for failure, however, would be high.

In light of these problems, the Commission should abandon the proposal to require SBC/Ameritech to provide advanced services through separate affiliates.

E. Most Favored Nation

The MFN proposals are so limited in scope that they will have essentially no effect in the marketplace. To begin with, both the "Out-of-Region" and "In-Region" MFN provisions apply only to "any interconnection arrangement or UNE." See Appendix A at ¶¶ 51-52. This language appears to be narrower than the statutory MFN provision, Section 252(i), which covers "any interconnection, service, or network element." 47 U.S.C. § 252(i). The removal of the broad term "service" from SBC/Ameritech's proposed MFN conditions is of course designed to exclude arrangements such as the exchange of ISP-bound traffic, access to rights-of-way, resale and many others that are covered by Section 252(i). Given that Congress clearly indicated that Section 252(i) MFN rights should apply to these arrangements, there is no policy basis for excluding them from the merger conditions designed to extend the geographic scope of those rights.

The Out-of-Region MFN proposal is also limited in other important respects. For example, it makes available to in-region CLECs, interconnection arrangements and UNEs that the SBC/Ameritech CLEC obtains through arbitration and that had not

been previously made available to any other CLEC by the ILEC in question. See Appendix A at ¶ 51. This provision does not cover arrangements that SBC/Ameritech opts into under Section 252(i) or that its obtains via voluntary negotiation. SBC/Ameritech can therefore avoid offering superior interconnection agreement terms available from other ILECs by avoiding arbitration. No doubt this is exactly what SBC/Ameritech will do in every case possible.

Moreover, the Out-of-Region MFN provision will be of little or no utility to CLECs even where it actually covers an interconnection agreement provision obtained by SBC/Ameritech's CLEC. The MFN offer is contingent on technical feasibility. SBC/Ameritech will therefore have the incentive to tailor its out-of-region arbitration requests to circumstances in which it can claim technical infeasibility in-region. Given the chronic problems regulators and competitors face in disproving ILEC technical infeasibility claims, this strategy is likely to be successful.

If technical infeasibility arguments fail, the proposed Out-of-Region MFN condition gives SBC/Ameritech the opportunity to show that an arrangement it obtains out-of-region must be priced higher in the SBC/Ameritech region. See id. Proper application of forward-looking cost methodologies should prevent large price disparities for UNEs and interconnection (of course, some states may not properly apply the forward-looking methodology), but arrangements not subject to that methodology are another matter

entirely. For such arrangements, for example collocation, SBC/Ameritech will work hard to raise the price for CLECs in its region, and will no doubt be successful in many cases.

The In-Region MFN provision is also so limited as to be essentially useless. Most importantly, the offer makes available to a CLEC in any SBC/Ameritech state only terms that have been voluntarily negotiated. As a practical matter, an ILEC will voluntarily offer the same arrangements throughout its region. A regionwide MFN provision can only lower entry barriers on a going-forward basis if it applies to arrangements that the ILEC refuses to offer on a voluntary basis but that it has been required (in arbitration) to provide in one state. The proposed In-Region provision will not serve this purpose since it applies only to voluntarily negotiated agreements.

Even the marginal benefits that an MFN applicable to voluntarily negotiated terms might deliver are eliminated by the terms of the proposal. In a merger context, where two ILECs may in the past have voluntarily offered different terms and conditions throughout their regions, there may be some benefit to requiring that the merged entity voluntarily offer everything that either of the merging ILECs had previously offered. The fact that the proposed In-Region MFN condition applies only to agreements approved after the merger eliminates this benefit. See id. at ¶ 52. Indeed, just to make sure nothing beneficial to competition slips through the cracks, the proposed In-Region MFN applies only to terms negotiated by SBC, thus eliminating any

agreements voluntarily negotiated by Ameritech prior to the deal that may be approved after the deal closes. See id.

Even for voluntarily negotiated terms and conditions subject to the In-Region MFN, SBC and Ameritech have provided themselves with plenty of ways to avoid offering provisions that prove to be truly beneficial to competition. For example, a CLEC requesting MFN rights for a voluntarily agreed term must also accept "all reasonably related terms and conditions." See id. This language appears to be broader than the Section 252(i) requirement that a carrier be permitted to opt into terms "on the same terms and conditions" as provided to another carrier. See 47 U.S.C. § 252(i). The language proposed by SBC/Ameritech gives it the opportunity to force CLECs attempting to exercise opt-in rights to accept onerous provisions that essentially "poison pill" any attractive interconnection agreement provision.[5] This result is easily avoided by replacing the "reasonably related" language in the proposed conditions with the language in Section 252(i). The

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[5] For example, the Proposed Interconnection Agreement ("PIA") initially proposed by Southwestern Bell in the Texas Section 271 collaborative proceeding included the requirement that CLECs opting into individual PIA provisions must also accept "all contract provisions which are legitimately related to or non-severable from the selected interconnection, service or network element arrangement desired by the CLEC." See "SWBT MFN Policy As Applied To The Proposed Interconnection Agreement" at 1, submitted in Texas PUC Project No. 16251. Under the PIA, "legitimately related" or "non-severable" provisions were defined to include a wide array of provisions concerning, among other things, the effect of intervening changes of law, limitations on liabilities, and amendments and waivers of an interconnection agreement. See id. at sections 1-4, 7, 18 and 31.

FCC has held "that the 'same terms and conditions' that an ILEC may insist upon [under Section 252(i)] shall relate solely to the individual interconnection, service, or element being requested under section 252(i)."[6] No greater restriction should be tolerated in this context.

In sum, the proposed MFN conditions are too limited and qualified to be helpful. The Commission should therefore replace them with the condition that any requesting carrier in any state(s) in the SBC/Ameritech region may opt into any provision of any existing or future SBC or Ameritech or SBC/Ameritech or SBC/Ameritech CLEC agreement. To the extent consistent with this requirement, the Commission rules implementing Section 252(i) should otherwise apply.

F. Regional Interconnection Agreements

While SBC/Ameritech promises to enter into regionwide agreements with CLECs, it is not clear from the proposed conditions what services and functionalities those agreements would cover. SBC/Ameritech states only that such agreements would cover "the provision of interconnection arrangements or UNEs." See Appendix A at ¶ 53. SBC/Ameritech is certain to construe this vague phrase to exclude most provisions, such as the exchange of ISP-bound traffic, that are normally covered by interconnection agreements. The Commission should therefore

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[6] See Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, 11 FCC Rcd 15499, at ¶ 1315 (1996).

require that the regional agreement cover all provisions that may be included in an interconnection agreement, including the exchange of ISP-bound traffic.

G. Out-Of-Region Local Services

The out-of-region entry commitments proposed by SBC/Ameritech are too limited to have any effect and largely ignore residential markets, which existing CLECs are unable to enter efficiently at this time. SBC/Ameritech proposes to have satisfied its commitment to enter an out-of-region market once it has (1) installed a switch or leased switching from a non-ILEC, (2) begun providing "facilities-based service" to one customer, (3) collocated facilities in ten wire centers, (4) offered service to all customers served by those ten wire centers, and (5) generally offered to provide service by any means it chooses throughout the metropolitan area in which it is collocated. See id. at ¶ 61.c. SBC/Ameritech could satisfy this requirement by serving one business using a CLEC's switch, collocating in ten offices and then making the terms of its service arrangement with its one customer available to all customers in the relevant metropolitan area. Furthermore, the service arrangement with the single customer can be so restrictive as to make the general service offering unattractive to any other customer.

This meager commitment to enter out-of-region markets cannot possibly require the massive combination of assets in the proposed transaction. CLECs such as TWTC with far fewer resources than either Ameritech or SBC have entered much more

extensively into metropolitan areas all across the country. CLECs are already introducing lower prices and improved service to businesses throughout the country. The merger is simply not necessary to increase this form of entry.[7]

If the Commission is intent on requiring SBC/Ameritech to commit to enter out-of-region markets as a condition of the merger, it should require the merged entity to use its scope and scale to enter into out-of-region residential markets. The focus on out-of-region residential markets would force SBC/Ameritech to deliver mass market consumer benefits that CLECs simply lack the scale and scope (so far) to deliver. It should not be enough simply to make a business service tariff available to all, including residential customers. SBC/Ameritech must be required to make available a genuine residential offering to a significant geographic area outside its region.[8] Short of such a requirement, the Commission should not bother with out-of-region commitments and should instead focus its attention on using the conditions to lower entry barriers in the SBC/Ameritech region.

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[7] Nor will the out-of-region entry be significant enough to break the existing tacit collusion between ILECs under which they forgo entering each other's markets. If SBC/Ameritech offers essentially no threat to another ILEC's market power, that ILEC will not feel that the terms of the tacit collusion have been violated, and that ILEC is unlikely to enter the SBC/Ameritech region.

[8] Of course, where out-of-region offerings are substantial and the in-region and out-of-region businesses share joint and common costs, there must be appropriate protections against cross-subsidy.

III. CONCLUSION

For the reasons explained herein, the Commission should reject the conditions proposed by SBC/Ameritech and should instead establish preconditions consistent with the proposals described in these comments.

Respectfully submitted,

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I, Carmen D. Minor, do hereby certify that on this 19th day of July 1999, copies of the attached Comments of Time Warner Telecom on Proposed Conditions were filed today with the FCC in CC Docket No. 98-141 and served by first class mail, postage prepaid, or hand delivered as indicated, on the following parties:

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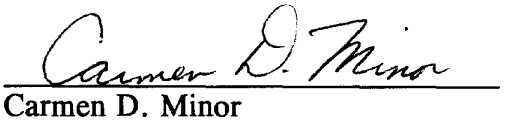

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